IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

MONDAY, THE 30TH JULY 2007 / 8TH SRAVANA 1929

CRL.A.No. 708 of 2003()

SC.557/2000 OF ADDITIONAL DISTRICT AND SESSIONS COURT
FAST TRACK (ADHOC II), KOZHIKODE)

.....

APPELLANT: ACCUSED

PURUSHOTHAMAN, S/O. MANDAN,
MAKKAMKUMMEL HOUSE, PATHIRIYAD AMSOM,
VADAKARA TALUK, KOZHIKODE DISTRICT.

BY ADV. SRI.V.N.RAMESAN NAMBISAN

RESPONDENT: RESPONDENT

STATE OF KERALA, REPRESENTED BY PUBLIC
PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

BY PUBLIC PROSECUTOR SRI PUZHAKKARA MOHAMMED.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD
ON 30/07/2007, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

ORDER IN CRL.M.P. NO.4466 OF 2003 IN CRL.APPEAL NO. 708 OF 2003.

DISMISSED

30.7.2007 Sd/-(K.THANKAPPAN, JUDGE)

K.THANKAPPAN, J.

CRL. APPEAL NO. 708 OF 2003

Dated this the 30th day of July, 2007

JUDGMENT

The sole accused in S.C. No.557 of 2000 on the file of the Additional District and Sessions Court Fast Track (Ad hoc II), Kozhikode is the appellant. The appellant faced trial for the offence punishable under Section 55(a) of the Abkari Act.

2. The prosecution case against the accused - appellant herein was that on 15.11.1999 at 7 p.m. while PW.5, the Sub Inspector of Police, Kuttiady was engaged in checking the vehicles along with PW.1 and other police constables, he found the appellant alighting through the back door of a bus holding a plastic bag and that on examining the bag it was found that the bag contained three bottles of 375 ml. Bon brandy and one bottle of 375 ml. King George Premium Grape brandy. To prove the charge against the appellant, the prosecution examined PWs.1 to 6 and Exts. P1 to P10 as well as MOs.1 and 2. No oral or documentary evidence was adduced on the side of the defence. On closing the prosecution evidence,

the accused was questioned under Section 313 Cr.P.C. The accused denied the allegations levelled against him. However, the trial court, relying on the evidence adduced by the prosecution, found the accused guilty under Section 55(a) of the Abkari Act, convicted him thereunder and sentenced him to undergo rigorous imprisonment for two years and to pay a fine of Rs.1,00,000/- and in default of payment of fine, to undergo simple imprisonment for a further period of six months. The above conviction and sentence are challenged in this appeal.

3. This Court heard the learned counsel appearing for the appellant as well as the learned Public Prosecutor.

4. Learned counsel appearing for the appellant has taken the following contentions: (i) the trial court went wrong in placing reliance on the evidence of PWs.5 and 6 to find the appellant guilty as there was no independent evidence to support the prosecution case, (ii) the trial court ought to have taken into account the fact that the contraband articles alleged to have been seized from the appellant and the samples were not sent to the court as per the procedure prescribed under the provisions of the Abkari Act and the Kerala Excise Manual, (iii) the prosecution had not explained the delay in producing the contraband articles and the

samples before the court as chances of tampering with the contraband articles cannot be ruled out and (iv) the finding of the trial court that the appellant committed offence punishable under Section 55(a) of the Abkari Act is not legally sustainable as the prosecution had not alleged and proved that the contraband articles found in the possession of the appellant were in connection with export, import, transport or transit as held by this Court in the decisions reported in **Surendran v. Excise Inspector, 2004 (1) K.L.T. 404** and **Sudhepan @ Aniyan v. State of Kerala, 2005(2) K.L.D. (Cri) 631.**

5. The trial court placed reliance on the evidence of PW.5, the Sub Inspector of Police, Kuttiady Police Station who detected the offence. He deposed before the court below that on 15.11.1999 while he was engaged in checking the vehicles, he saw the accused alighting through the back door of a bus holding a black plastic bag. He further stated that on examining the plastic bag he saw three bottles of 375 ml. Bon brandy and one bottle of 375 ml. King George brandy and that as the accused was carrying the contraband articles without any permit or licence, he arrested the accused after issuing Ext.P1 arrest memo and seized the contraband articles as per Ext.P5 seizure mahazar.

6. The version given by PW5 is corroborated by the evidence of PW.6. This witness stated that as instructed by PW.5, he proceeded to the scene of incident, prepared Ext.P4 scene mahazar and questioned the witnesses and recorded their statements. He further stated that he produced the material objects before the court with a property list and requisition for sending the samples for chemical analysis. PW.1, the police constable who had accompanied PW.1 also supported the version given by PW.5. On the basis of the above evidence, the trial court found that the prosecution succeeded in proving the case against the accused.

7. The question to be considered in this appeal is whether the evidence of PWs.5 and 6 can be accepted to prove the case against the appellant. In this context, the evidence of PWs.2 and 3, the two independent witnesses who signed Ext.P5 seizure mahazar is relevant. These two witnesses stated before the court below that they had not seen the search and seizure of the contraband articles from the appellant. They also denied their signatures in Ext.P5 seizure mahazar. Though the incident happened on 15.11.1999, Ext.P9 property list would show that the contraband articles seized from the appellant and the samples taken from the contraband articles were produced before the court below only on 18.11.1999. When a specific question was put to PW.6 regarding the delay

in producing the contraband articles before the court, he stated that the delay occurred due to lack of police constables. No other explanation was offered by him in this regard. It is the duty of the prosecution to prove that the contraband articles and the samples were produced before the court below without unnecessary delay. Mere delay in the production of the contraband articles before the court below may not have much relevance. But, in this case, the delay occurred is relevant in the light of the case set up by the appellant and the evidence of PWs.2 and 3. In this context, the learned counsel appearing for the appellant brought to the notice of this Court the decision reported in **Dominic v. State of Kerala, 1989(1) K.L.T. 601**. In the above judgment, relying on the provisions of Section 102(3) Cr.P.C. and the provisions of the Kerala Excise Manual, this Court held as follows:

> "S. 102(3) of the Code requires that, seizure should be reported to the Magistrate `forthwith'. It is also necessary to produce the article seized in Court, unless it cannot be conveniently transported. Paragraph 17, 26, 34, 49 and 77 of the Kerala Excise Manual (Volume II-Chapter XXV) also require notice . Paragraph 17 reiterates that searches should be made in conformity with provisions in the Code of Criminal Procedure. Paragraph 26 requires the article seized to be produced before an Excise Inspector within twelve hours. Paragraph 34 states that one sample should be sent to the

> Magistrate. Paragraph 49 states that reports of search and seizure should reach the Court within 24 hours. ....."

In the light of the above observation, learned counsel appearing for the appellant submits that PWs.5 and 6 had not given any explanation for the delay in producing the contraband articles before the court below and that they had not stated that the contraband articles were kept in safe custody till the same were produced before the court. In this context, counsel also relied on the decision of this Court reported in **Narayani v. Excise Inspector, 2002(3) K.L.T. 725**.

8. The next point to be considered is whether, even accepting the evidence of PWs.5 and 6, the appellant has committed offence punishable under Section 55(a) of the Abkari Act. The prosecution case is that the appellant was found in possession of the contraband articles for the purpose of sale. But, the prosecution failed to produce any evidence to show that the contraband articles found in the possession of the appellant were in connection with export, import, transport or transit. In this context, learned counsel for the appellant relies on the judgments of this Court reported in **Surendran v. Excise Inspector, 2004(1) K.L.T. 404** and **Sudhepan @ Aniyan v. State of Kerala, 2005(2) K.L.D. (Cri) 631.**

In the above judgments, this Court held that the prosecution should allege and prove that the accused was found in possession of the contraband articles in connection with export, import, transport or transit in order to attract an offence under Section 55(a) of the Abkari Act.

9. In the light of the principles laid down by this Court in the decisions referred to above and taking into account the fact that the prosecution has not succeeded in proving that the appellant committed offence punishable under Section 55(a) of the Abkari Act, this Court is of the view that the appellant is entitled to an acquittal. Accordingly, the impugned judgment is set aside. The appellant is found not guilty of the charges levelled against him and he is acquitted of the charges.

The Crl. Appeal is allowed as above. The bail bonds executed by the appellant shall stand cancelled.

(K.THANKAPPAN, JUDGE)

sp/

K.THANKAPPAN, J.

CRL.APPEALNO.708/2003

JUDGMENT

30TH JULY, 2007.